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Supreme Court of the United States

OCTOBER TERM,, 1938.

No. 182

FORD MOTOR COMPANY,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD.

No. 183

FORD MOTOR COMPANY,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD.

BRIEF ON BEHALF OF PETITIONER IN REPLY TO BRIEF FOR NATIONAL LABOR RELATIONS BOARD IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FREDERICK H. WOOD
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Counsel for Petitioner.

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1

CERTIORARI SHOULD BE GRANTED WITH RESPECT TO THE ORDER OF THE CIRCUIT COURT OF APPEALS PERMITTING THE BOARD TO WITHDRAW ITS PETITION WITHOUT PREJUDICE.

It is claimed by the Board in its brief that the action of the Circuit Court of Appeals in permitting the Board,

without authority in the statute, to withdraw without prejudice its petition to enforce the order made by it against Petitioner, was a proper order by reason of the alleged fact that the order did not prejudice Petitioner. It is apparently conceded, as it must be under the cases,[1] that where true affirmative relief has been demanded, the party opposing a withdrawal without prejudice is subjected to prejudice if the withdrawal be permitted. The claim, however, is that the prayer in our answer for affirmative relief, to wit, for the setting aside of the order, is not for true affirmative relief. In other words, it is asserted that a reviewing court's refusal to enforce an order of the Board is in all respects equivalent to setting aside that order. Obviously it is not. When the reviewing court dismisses a petition to enforce, without setting aside the order, it seems entirely plain that the Board's order remains in force and effect, and that if the Board cared to, it could reapply later for enforcement or even apply to another Circuit Court of Appeals for that purpose. On the other hand, when a court dismisses an ordinary civil case without prejudice, nothing remains pending, and the situation is the same as if the case had never been brought. Thus, what the Petitioner has asked in the setting aside of the order is true affirmative relief, and this, of itself, for the reasons stated in our main brief, and in view of the cases therein cited, defeats the Board's argument.

Moreover, as conclusively demonstrated in Point IV, pages 19 through 25 of our main brief, very substantial prejudice has accrued to Petitioner by reason of the Court's order in that it is forced into a second administrative pro-

[1] *E. g., Ex Parte Skinner* v. *Eddy Corp.*, 268 U. S. 93, and other cases cited at pages 14-15 of our main brief.

ceeding after the first has been definitely closed, and after a court has obtained exclusive jurisdiction of the Board's order.[2] None of the Board's cases hold that there can be a dismissal without prejudice, after the case is closed, and indeed they suggest to the contrary. Petitioner has thus been deprived of the opportunity of demonstrating to the Court that the Board's order should be set aside for the many and sundry reasons set forth in its answer (R. 9-21) including many important ones not mentioned by the Board in its petition to withdraw without prejudice. Assuming that some of these defects are correctible, it is rather plain that others are not. Hence petitioner has a right to have these passed on by the Court which had obtained exclusive jurisdiction, before being burdened with a second administrative proceeding. This case is not one in which the administrative tribunal has confessed to an error or errors which are clearly correctible and has asked the opportunity of correcting them. If it had done this, then the order would be set aside upon specified grounds and these matters would have been settled in so far as their effect upon further proceedings by the Board is concerned. Not having done so, it is respectfully submitted that it had no more right than a respondent seeking to set an order aside would have to withdraw without prejudice to avoid a consideration of the issues.

Up to this point, we have argued on the assumption that some prejudice to Petitioner is necessary in order to justify its position. It would seem clear that it is not.

[2]Surely the rule that one must exhaust his administrative remedy before resorting to the courts does not mean that after an administrative tribunal has closed a hearing and elected to go into court, it can compel the unlimited further hearings which the Board's contentions would make possible.

Unless the Circuit Court of Appeals, which is granted only a special and limited jurisdiction by the statute, has the power to permit a withdrawal without prejudice, it would seem clear that its order is unauthorized, whether or not Petitioner is actually prejudiced thereby. The case in this respect is analogous to a trial court becoming *functus officio* upon the expiration of the term. *Roemer* v. *Simon*, 91 U. S. 149; *Realty Acceptance Corporation* v. *Montgomery*, 284 U. S. 547.

Finally, the Court is dealing in this case with a statutory proceeding. The statute (Sec. 10 d, e and f) contemplates that when the jurisdiction of the Court is invoked either by the Board or by the employer, the Court at the conclusion of the case shall enter an affirmative order either enforcing the order of the Board or setting it aside. In its last analysis, the argument of the Board is that even after the jurisdiction of the Court has attached, the Court, at the instance of the Board, may direct the proceeding to be discontinued in order to permit the Board to patch up its record and by so doing either avoid issues raised in court or cure existing infirmities in the order, by reason of which the Court would be required to set it aside. The Board would never admit that any such correlative right could be recognized in the employer. But it says that it is entitled to have the case discontinued at its instance for this purpose because the employer will then obtain, by the voluntary act of the Board, the same relief which it would obtain from the Court in the event that the order should be set aside. It is therefore claimed that the employer has not been prejudiced. We think it is clear it has been prejudiced by the very course suggested because, for one thing, it has been deprived of an affirmative decree to which

it is entitled setting aside the order, but whether it has been prejudiced in other ways would depend upon the grounds upon which an order of Court setting the order of the Board aside was based. These might be such that the making of any further order on the same record would be impossible.

II

CERTIORARI SHOULD BE GRANTED WITH RESPECT TO THE ORDER OF REMAND MADE BY THE CIRCUIT COURT OF APPEALS.

The cases cited by the Government (pp. 15-18) not only do not support its position but are authorities in favor of ours. In *Texas & Pacific Railway Co.* v. *Interstate Commerce Commission*, 169 U. S. 197, this Court definitely said at page 238 that the decree should be reversed before a "remand" to the Interstate Commerce Commission. As appears from the headnote in *Southern Railway* v. *St. Louis Hay & Grain Co.*, 214 U. S. 297, and from page 302 in that opinion, the judgments of the lower court were reversed before the "remand". In all three of the Federal Trade Commission cases, cited by the Government at pages 15-16 of its brief, the order of the Federal Trade Commission was set aside, and they are strictly in accord with our argument.

In a strict sense, of course, there is no remand when the courts are dealing with an order of an administrative tribunal as distinguished from an order, judgment or decree of a court. In the former case the reviewing court merely indicates its views as to what ought to be done for the guidance of the administrative tribunal, which being the law, may authorize the Board in some cases to reopen the proceedings or to utilize the old record in new proceedings.

The cases above discussed are all of the cases cited by the Board bearing upon the power of an appellate court to remand to an administrative tribunal without setting aside the order of the tribunal. They incontestably demonstrate the validity of our argument.

In an attempt to explain its failure to find any cases to support its argument, the Board resorts to what it claims is an analogous situation, that is the relationship between an appellate court and a lower court. The situation is plainly not analogous because the appellate court and the lower court are both impartial and parts of the judicial system, while an administrative tribunal is not judicial, combines the functions of prosecutor and judge, and is independent of the courts which are only authorized to review the regularity of its proceedings and not to direct them.

In our main brief, however, we have demonstrated that the same rule applies in the case of a remand by an appellate court to a lower court, that is that the judgment or decree must be reversed, as it has not been here. This clearly appears from *Duke Power Co.* v. *Greenwood County*, 299 U. S. 259, which the Government futilely attempts to distinguish. It is argued that the Board "understands that it is to vacate its order", but even if this had the same legal effect as a vacation by the court, as it has not, this would mean nothing because the appellate court has no control over an administrative tribunal which, once it gets the case back, can do anything it pleases with it, and indeed in this case upon making a new order can go into some other Circuit Court of Appeals and thus prevent the court which remanded from having any control in the enforcement of directions.

The fact is that administrative tribunals are utterly different from courts. They combine the functions of prosecutor and judge. When as in such cases as *Roemer v. Simon*, 91 U. S. 149, and *Baltimore S. S. Co.* v. *Phillips*, 9 F. (2d) 902, a lower court has asked the return of a record, it is in a very different position from an administrative tribunal. The court is impartial, the administrative tribunal must make its request through its prosecuting arm which is carrying on the litigation in court. The difference is vast, and the request of the administrative tribunal is to be analogized to the request of a party and not of a court.

It is unnecessary to discuss the various other cases cited by the Government on page 17 of its brief. In none are the facts even remotely similar to our situation, and they all concern the relationship between an appellate court and the lower courts or between a trial court and its officers, and not between a Circuit Court of Appeals and an administrative tribunal.

It is respectfully submitted that the writs in both cases should be granted.

Respectfully submitted,

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